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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-487

JOSEPH S. SEAMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

JOSEPH S. SEAMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the Superior Court of the State of New Jersey, Appellate Division.

The petitioner respectfully prays that a Writ of Certiorari issue to review the final order of the Supreme Court of the State of New Jersey entered herein on July 7, 1971, denying certification.

Opinion Below

The Order of the Supreme Court of the State of New Jersey denying certification was without opinion and is printed in 58 N. J. 594, 279 A. 2d 679. The Opinion of

the Appellate Division of the Superior Court of New Jersey affirming the judgment of conviction is printed in 114 N. J. Super. 19, 274 A. 2d 810, and is reprinted as Appendix A at page 1a herein.

Jurisdiction

The final order of the Supreme Court of the State of New Jersey was made and entered on July 7, 1971, and is appended here to *infra* at page 15a. The jurisdiction of this court is invoked under the provisions of Title 28: U. S. Code, Section 1257 (3).

Questions Presented

1. Whether the rights of the petitioner, under the confrontation clause of the 6th amendment of the Constitution, were abridged when the State placed before the jury hearsay statements of an alleged co-conspirator where the co-conspirator was, while available, not called by the State to testify.

2. Whether petitioners rights under the confrontation clause of the 6th amendment of the constitution were abridged when the State was permitted to play records of hearsay statements of an alleged co-conspirator where the co-conspirator was, while available, not called by the State to testify.

3. Whether the wholesale admission of hearsay statements attributed to an alleged co-conspirator, including tape recordings of such statements, constituting the most important evidence produced by the prosecution, abridged the petitioners' right to confrontation.

Constitutional Provisions Involved

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statement of the Case

The petitioner, Joseph J. Seaman, was indicted by a grand jury in the State of New Jersey in December of 1968, in four separate indictments charging misconduct in office, extortion, bribery and conspiracy. Seaman, a public officer appointed by the Governor of the State as secretary and a member of the State Board of Certified Public Accountants, was charged essentially with accepting unlawful fees or rewards in connection with his official duties. The indictments joined a codefendant, one Stanley Broskie who was later allowed to plead guilty to one count and was fined $1,000.00. The indictments against Seaman were moved in September of 1969 in the Superior Court of New Jersey, and at the time of the trial all charges against Broskie were severed and Seaman was tried alone. The trial resulted in a verdict of guilty on the extortion, misconduct and conspiracy charges, and Seaman was sentenced to imprisonment for a period of one to three years in the State prison and a fine of $5,000.00. An appeal was taken to the Appellate Division of the Superior Court of New Jersey, and in March of 1971,

the judgment was affirmed. A Petition for Certification was submitted to the Supreme Court of the State of New Jersey, which petition was denied on July 7, 1971. Immediately after the denial of the Petition for Certification, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the District of New Jersey. Said petition was denied, and the District Court refused to certify probable cause for appeal. A motion was made in the United States Court of Appeals for the Third Circuit for a Certificate of Probable Cause which motion was denied in August of 1971.

The principal ground for appeal was that Seaman's right to be confronted by the witnesses against him was abridged by the extensive use of hearsay statements of the codefendant Broskie and also by the use of tape recordings of several hearsay statements of Broskie. It should be noted that at the time of the trial of Seaman, Broskie's case had been severed. He had been allowed to plead to one count of conspiracy and was sentenced to pay a fine of $1,000.00. At the time of the trial several indictments remained open against him; and the State was in possession of a long sworn statement made by Broskie, which among other things, incriminated the Petitioner, Seaman. There is no dispute that Broskie was available to the State as a witness, but he was never called.

The hearsay statements were received in evidence through the testimony of various alleged coconspirators and admission was allowed under the provisions of a Rule of Evidence (63(9)) of New Jersey.

The Petitioner preserved the question for appeal by raising objections at the time the testimony was offered, by moving for a mistrial at the end of the case and by urging it at each stage of the proceeding.

The Petitioner is presently serving his custodial sentence at the New Jersey State Prison, Trenton, New Jersey.

Reasons for Granting Writ

The questions presented by this case represent a serious area of conffict in the law. On one side is a constitutional guarantee, at a trial, of the fundamenal right of an accused to confront the witnesses against him. On the other side is a rule of evidence which creates an exception to the prohibitions of the hearsay rule. In addition, this case involves a question of fundamental fairness in the prosecution of a criminal case. In toto, these proceedings call for a clear determination by this Court of where the line can be drawn between the right to confrontation and admission of out-of-court statements of alleged accomplices.

This case represents a most flagrant abuse of an exception to the Hearsay rule. In the State of New Jersey the so called co-conspirators declarations exception is set forth in the rule of evidence which provides in part as follows:

> "A statement which would be admissible if made by the declarant at the hearing is admissible against a party if . . . (b) at the time the statement was made the party and the declarant were participating in a plan to commit a crime . . . and the statement was made in furtherance of that plan." Rule 63 (9).

Under the provisions of that rule the prosecution offered the testimony of various persons as to alleged out-of-court statements made by Stanley Broskie also an alleged co-conspirator. In addition, the trial judge per-

mitted the State to supplement the in-court testimony of one of the co-conspirator witnesses with recordings of telephone conversations between the witness and Stanley Broskie. The telephone conversations and the other statements attributed to Broskie were most damaging to the position of the Petitioner and supplied nearly all of the evidence of a criminal scheme which was produced by the prosecutor. Prior to the trial, Broskie had been severed from the case, was permitted to plead guilty to one charge and was fined $1,000.00. He had given a statement under oath to the prosecutor which implicated the Petitioner and was available to subpoena by the State during the course of the trial. He was never called though he was obviously available and the State was satisfied to utilize the evidence of the extra-judicial statements as a means of supplying the testimony which might have come from the lips of Broskie. This was the safest course for the State since its effect was to deny to the Petitioner the opportunity to demonstrate by way of effective cross-examination that the declarations of Broskie were fabrications made by him for his own purposes. In *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965), it was held that,

> "The Sixth Amendment's right of an accused to confront the witness against him is, . . . a fundamental right and is made obligatory on the States by the 14th Amendment."

Since that case it has been held in the case of *Barber* v. *Page,* 390 U. S. 719, 20 L. Ed. 255, 88 S. Ct. 1318 (1968), that cross-examination at a prior hearing involving the same parties and the same issues does not satisfy the confrontation rights where the witness is available to be called at the trial. In the same case it was further held that not only does the right to confrontation include the

opportunity to cross-examine but it also provides the occasion for the jury to weigh the demeanor of the witness. Of course, in the trial of this case the Petitioner was able to cross-examine all of the witnesses actually called to testify including the alleged co-conspirator who testified as to the statements made by Broskie, however, as in the case of *Douglas* v. *Alabama,* 380 U. S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965), the cross-examination of those witnesses could not substitute for the cross-examination of the declarant in order to test the truth of the out-of-court statements. In this case, of course, unlike *Douglas* v. *Alabama, supra,* and unlike *Dutton* v. *Evans,* 400 U. S. 74, 27 L. Ed. 2d 213, 91 S. Ct. (1970), the fact situation involves extra-judicial statements allegedly made in the course of a criminal conspiracy. In other words the evidence would conform to the so called "federal conspiracy rule" wherein the out-of-court statement of one conspirator is admissible if made in the course of and in furtherance of the conspiracy but not during a subsequent period. *Lutwak* v. *United States,* 344 U. S. 604, 97 L. Ed. 593, 73 S. Ct. 481 (1952); *Krulewich* v. *United States,* 336 U. S. 440, 93 L. Ed. 790, 69 S. Ct. 716 (1949). Here, however, we have a situation wherein that rule was enforced to an extreme and with a result which could hardly have been intended by those who formulated the rule. By utilization of the rule, the State was able to present evidence consistent with its theory of the guilt of the Petitioner without the embarrassment of putting the credibility of that evidence to the test. It is the contention of the Petitioner that this is a case which presents all of the unanswered questions as posed by Mr. Justice Marshall in his dissenting opinion. *Dutton* v. *Evans, supra,* as the Justice said in that case that the confrontation of witnesses through cross-examination is meant to aid in answering questions as to what the de-

clarant said, what the declarant meant and whether or not it was the truth. In this case, if Broskie had testified and had been cross-examined, the Petitioner could have fully explored those areas, and then the jury would have been in a position to evaluate all of the statements and declarations of Broskie in the light of his testimony and demeanor.

CONCLUSION

The Petitioner was deprived of a fair trial by reason of the denial of confrontation with the principal witness against him. The Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—March 9, 1971.)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-728-69

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH J. SEAMAN,

Defendant-Appellant.

Argued February 1, 1971—Decided March 9, 1971.

Before Judges GOLDMANN, LEONARD and MOUNTAIN.

On appeal from Essex County Court, Law Division.

Mr. Walter D. VanRiper argued the cause for appellant (*Messrs. VanRiper, Belmont & Villanueva,* attorneys; *Mr. Frederic C. Ritger, Jr.,* on the brief).

Mr. David S. Baime, Assistant Prosecutor, argued the cause for respondent (*Mr. Joseph P. Lordi,* Essex County Prosecutor, attorney).

Opinion of the Superior Court of New Jersey, Appellate Division

The opinion of the court was delivered by

LEONARD, J.A.D.

The Essex County grand jury returned four indictments against defendant charging him with the following: (1) No. 863—five counts of misconduct in office (N.J.S.A. 2A:85-1); (2) No. 864—conspiracy with one Stanley Broskie to violate the statutes prohibiting misconduct in office and extortion (N.J.S.A. 2A:98-1); (3) No. 865—five counts of bribery (N.J.S.A. 2A:85-1) and (4) No. 866—five counts of extortion (N.J.S.A. 2A:105-1).

Following a jury trial defendant was convicted of all offenses except the bribery charge which was dismissed by the court at the end of the State's case. Defendant received a total sentence of 1-3 years in State Prison and a fine of $5000.

Defendant, a certified public accountant since 1928 and an attorney since 1934, was appointed in 1937 to the State Board of Certified Public Accountants (State Board). He became its secretary in 1938 and served in that position until 1968.

The State Board was responsible for preparing, administering and grading the C.P.A. examinations. See N.J.S.A. 45:2A-1 *et seq.* Although the American Institute of Certified Public Accountants actually prepared the examinations and preliminarily graded the papers, its marks were purely advisory, final responsibility for grades resting with the State Board. N.J.S.A. 45:2A-7. The grades determined by the Institute usually were accepted in the first instance by the State Board and it notified candidates that they passed or failed. However, the

grades of a number of those who failed would be reviewed by the State Board and in some cases the Institute grades were changed. The authority for reviewing and regrading these papers was delegated to defendant, he having exclusive jurisdiction and discretion in this respect.

The present charges stem from defendant's alleged improper conduct with regard to his regrading of the examination papers of Francis Cerny, Robert Pacca, George VanHook, Sol Glick, Sidney Stern and Gerrold Berr. Each of these individuals had been students in a cram or review course conducted by Stanley Broskie, a C.P.A. with offices in East Orange, New Jersey. Likewise, each had failed all or parts of the C.P.A. examination. (The examination consisted of four sections: Law, auditing, theory and problems.)

The State contended that each of the named candidates was approached by Broskie who told them that their papers would be regraded if they would pay him a certain sum of money and take an additional sum to defendant at his office. They were to talk to defendant generally about accounting, the examination and their personal situation, then hand him an envelope, usually containing $1000 in small bills. This money was to be for either "his favorite charity" or the Joseph J. Seaman Scholarship Fund, the latter being a fund which defendant had begun (but did not administer) with the proceeds of a testimonial dinner previously given in his honor by the New Jersey Society of C.P.A.'s. No receipts were ever issued for these "contributions."

Incidentally, Broskie was indicted on the conspiracy, bribery and extortion charges along with defendant, but

pleaded guilty to the conspiracy charge before defendant's trial began and fined $1000. The other charges were held open.

Robert Pacca (listed as a co-conspirator on the conspiracy indictment, but not included as a defendant) testified that he had taken the C.P.A. examination on several occasions from November 1963 to May 1967 but never passed any of the four portions. After taking Broskie's cram course, Pacca took the November 1967 examination. Before the grades were officially announced, Broskie called Pacca to tell him he had passed two parts. Pacca then went to see Broskie, and Broskie told him he "could get [him] passed" on the other portions of the examination if Pacca were willing to "make a contribution to the scolarship fund" at a total cost of $1500. Pacca agreed to the scheme about ten days later. Approximately one month thereafter Pacca received a letter from the State Board saying he had passed all four parts of the examination. A week later, at Broskie's direction, he brought Broskie an envelope with $500 in cash and then made an appointment to see Seaman, went to his office in Perth Amboy and left $1000 in small bills on his desk. Seaman did not open the envelope in Pacca's presence, give him a receipt, or sent a letter of acknowledgment, as he promised he would. Pacca did not deduct the $1000 as a contribution to charity on his income tax return.

On cross-examination Pacca admitted he knew the State Board had the right to regrade the examination papers. He also said that he asked Broskie if he could pay him by check, but Broskie emphasized he should bring cash.

Similar testimony was adduced as to Francis Cerny, George VanHook, Gerrold Berr and Sol Glick, four other

co-conspirators listed in the conspiracy indictment, and as to Sidney Stern, all five previously unsuccessful examination candidates. Cerny testified that he had originally brought Broskie envelopes with blank checks. Broskie said they were unacceptable so Cerny cashed the checks and gave both Broskie and Seaman cash in envelopes. VanHook said that when he went to Seaman he gave him the envelope, saying "I want to contribute the money to the scholarship fund." Berr said Broskie told him, "It will cost you two big ones." Glick told Seaman the money was "for [his] favorite charity." Stern said Seaman picked up his envelope and began, on his own, telling Stern about the laudable aims of the scholarship fund. None of these men was given a receipt for his contribution and none took the contribution as a deduction on his income tax return.

John Kortbawi, an agent for Internal Revenue Service, testified that after he had taken the fourth part of the examination—he had earlied passed the first three parts—he received a letter from Broskie requesting an appointment. When Kortbawi got to Broskie's office, Broskie told him he "didn't quite make it." Kortbawi told Broskie he was an I.R.S. agent, to which Broskie replied, "Wow, you're hot stuff. If I had known that, I wouldn't have called you." However, after ascertaining that Kortbawi did want to become certified, Broskie said, "If I'm going to give you something that you are going to have to pay for, you are going to have to get something back in exchange for it. • • • [Y]ou're a big boy. You know what the score is in this world." He then told Kortbawi that he would have to make a contribution to the fund in order to pass. Kortbawi testified that Broskie said of Seaman, "As inde-

pendently wealthy and rich as this man is, he still likes to get a little money on the side." Kortbawi said he reported the incident to a group supervisor and then had an electronic device attached to his telephone. Broskie and Kortbawi had several subsequent conversations pertaining to the amount of the "contribution" that had to be made, and Kortbawi's most recent failure on the examination, all of which were taped and played for the jury. In another conversation Broskie told Kortbawi that he "just got off the phone * * * with the big cheese," in reference to the notification that Kortbawi was soon to get that he passed the examination. Kortbawi said he had visited Seaman earlier to discuss the examination and that he told Seaman at that time he would consider it "an honor" to contribute to the scholarship fund. At that time Seaman indicated to Kortbawi that he did not want there to be any connection between a contribution and the examination.

Defendant took the stand on his own behalf and denied participating in any scheme with Broskie or having improperly accepted payments in his official capacity as Board secretary. He said he recommended Cerny and the others for certification because of the quality of their papers, not because of the contributions. He considered the monies as payments to the scholarship fund, totally unrelated to the regrading. However, he admitted that 22 of the 23 accountants who contributed to the fund had been regraded. Seaman said that on June 3, 1968 he sent a $10,000 check from his personal account to the scholarship fund; this contribution included the contributions made by the successful candidates, although their names were not mentioned in Seaman's letter of transmittal.

Opinion of the Superior Court of New Jersey, Appellate Division

In addition to a host of fact witnesses, defendant produced an impressive selection of prominent character witnesses.

Defendant first contends that the introduction into evidence of tapes of the various Broskie-Kortbawi conversations was prejudicial error because this procedure denied him the constitutional right of confrontation under the Sixth and Fourteenth Amendments. He asserts that all of Broskie's statements on the tape were made out of defendant's presence and were intended to involve defendant, without his knowledge.

Although the United States Supreme Court has recognized that the Sixth Amendment's right of an accused to confront the witness against him is a fundamental right made obligatory on the States by the Fourteenth Amendment, the court, nevertheless, in *Dutton* v. *Evans*, —— U.S. ——, 27 L. Ed. 2d 213 (1970), held:

> It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced.
>
> • • •
>
> "• • • The issue before us is the considerably narrower one of whether a defendant's constitutional right "to be confronted with the witnesses against him" is necessarily inconsistent with a State's decision to change its hearsay rules . . . While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Con-

> frontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; • • •.'
>
> • • •
>
> It seems apparent that the Sixth Amendment's confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now. [at 222-226]

See also *California* v. *Green*, 399 U. S. ——, 26 L. Ed. 2d 489 (1970).

In this State, *Evidence Rule* 63(9) provides that

> A statement which would be admissible if made by the declarant at the hearing is admissible against a party if • • • (b) at the time the statement was made the party and the declarant were participating in a plan to commit a crime of civil wrong and the statement was made in furtherance of that plan.

In *State* v. *Boiardo*, 111 N.J. Super. 219 (App. Div. 1970), certif. den. 57 N.J. 130 (1970), we declined to hold that the "Confrontation Clause invalidates the above-quoted evidence rule." [at 230]. We concluded that the "introduction in evidence of hearsay statements made by co-defendants in furtherance of a conspiracy in which [defendant] was a participant did not violate his Sixth Amendment right to be confronted by witnesses against him." *Ibid.* These declarations of a conspirator constitute

an exception to the hearsay rule, affording in the circumstances a sufficient guarantee of testimonial trustwothiness. *State* v. *Carbone,* 10 N.J. 329, 341 (1952).

Defendant's assertion that the State failed to prove a *prima facie* case of conspiracy prior to the admission of the tapes is without merit. In such a situation the threshhold requirement for admissibility is satisfied by showing the likelihood of an illicit association between the declarant and defendant. *United States* v. *Ragland,* 375 F. 2d 471, 477 (2 Cir. 1967), *cert.* den. 390 U.S. 925 (1968). Prior to the introduction of the tapes, Pacca, Cerny and the others all testified to the "likelihood" of such an illicit agreement.

Defendant further argues that the very use of the tapes was prejudicial, in that the memorialization on tape of certain testimony tends to highlight it and emphasize it most vividly in the jurors' minds. The use of sound recordings is not inherently prejudicial. *State* v. *Driver,* 38 N.J. 255, 287-288 (1962).

Finally, defendant claims that although the recordings might have been evidentially competent as to the conspiracy charge, they played no part in the misconduct and extortion charges and their use was therefore confusing to the jury and prejudicial. There is no basis to this claim. The trial judge in his charge specifically and clearly told the jury that the Broskie tapes could not be considered in relation to the other offenses (besides conspiracy). A similar argument was raised and rejected in *State* v. *Dennis,* 43 N.J. 418, 424 (1964).

Based upon all of the above, we conclude that the Broskie-Kortbawi tapes were properly received in evi-

dence and defendant was neither prejudiced nor otherwise thereby denied a fair trial.

Defendant next contends that the trial court committed error in failing to instruct the jury that they could draw an inference adverse to the State from its failure to produce Broskie.

Such an adverse inference is not proper if the witness was available to both parties or "by his position would be likely to be so prejudicial against the party that the latter could not be expected to obtain the unbiased truth from him." *State* v. *Clawans*, 38 N.J. 162, 171 (1962); see also *Wild* v. *Roman*, 91 N.J. Super. 410, 414 (App. Div. 1966). Broskie was not in custody at the time and his whereabouts was equally known to defendant as well as by the State. Thus, he was available to both parties. Further, the record clearly indicates that even though Broskie originally promised the State that he would be helpful in the prosecution of defendant, thereafter, and before trial, he expressly stated to the prosecutor and his own counsel that he was "hostile to the State" and that he "wants to help the defendant in any way that he can." At the time defendant moved for a *Clawans* charge, the trial court gave defendant an opportunity to reopen his case and call Broskie as a defense witness but this offer was refused. Under all these circumstances, the judge correctly refused to gave a *Clawans* charge.

Defendant's next contention is that his motion for judgment of acquittal on the conspiracy charge, made at the conclusion of the State's case, should have been granted because there was insufficient evidence of a conspiracy independent of hearsay declarations of the alleged accomplice. We find there was.

A conspiracy may be proved either by direct or circumstantial evidence. *State* v. *Carbone, supra,* 10 N.J. at 341. Proof of the existence thereof is generally a matter of inference deducted from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between or among them. *Ibid.* "The prosecutor is permitted to bring in ambiguous and somewhat unrelated acts, statements, conversations and transactions in the hope that when viewed as a whole, the inference of a pre-planned scheme will emerge. In short, when the total effect of the proof indicates sufficiently the existence of a conspiracy, the case must go to the jury." *State* v. *General,* 42 N.J. 366, 376 (1964).

We believe the trial court properly denied this motion. Considering the State's evidence in its entirety and giving the State the benefit of all its favorable testimony as well as all the inferences that could reasonably be drawn therefrom, we conclude that the jury could find defendant's guilt of the crime beyond a reasonable doubt. *State* v. *Reyes,* 50 N.J. 454, 458-459 (1967). As we have previously indicated, the testimony of witnesses, independent of the tapes, established defendant's direct role in the conspiracy. Among other factors, it was not contradicted that he accepted envelopes from each containing small bills without counting them, immediately after regrading their examinations.

Defendant also maintains that the conspiracy indictment fails to charge a crime, since the offense can only be committed by the concerted action of the parties to it. He bottoms his position upon the so-called Wharton rule of conspiracy. That rule as originally formulated stated that

> When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a nature that it is aggravated by a plurality of agents cannot be maintained. [2 *Wharton, Criminal Law* (12th ed. 1932), §1604 at 1862. See also. 1 *Wharton, Criminal Law and Procedure* (Anderson ed. 1957), §89 at 191]

Although the existence of this general rule was recognized in *State* v. *Lennon*, 4 N.J. Super. 415, 419 (App. Div. 1949), we noted [at 420], "[W]here a crime from a legal standpoint may be committed by one person only, a conspiracy between two or more persons to commit that offense changes the character of the offense and the stated rule does not apply." The Supreme Court affirmed in 3 N.J. 337 (1949) and said:

> • • • the conspiracy is also criminal where it contemplated the co-operation of a greater number of parties than were necessary to the commission of the principal offense. Here the conspiracy [to commit bookmaking] charged and proved included participants who were not indispensable to the consummation of the substantive offense. This is the distinguishing principle • • •. [at 343]

In the instant case the conspiracy indictment charged defendant with conspiring to violate the common law offense of misconduct in office (N.J.S.A. 2A:85-1) and the statutory offense of extortion (N.J.S.A. 2A:105-1).

The crime of misconduct in office is defined to be corrupt misbehavior by an officer in the exercise of the duties

of his office or while acting under the color of his office. *State* v. *Begyn,* 34 N.J. 35, 49 (1961); *State* v. *Silverstein,* 76 N.J. Super. 536, 540 (App. Div. 1962), aff'd 41 N.J. 203 (1963). Having by color of his office received money to which he was not legally entitled by reason of or in connection with his legal duties, defendant was guilty of the crime of extortion under our statute. *State* v. *Begyn, supra,* at 47. There is a distinction between that crime and bribery; the latter offense consists in *offering* a present or *receiving* one, while the former consists in *demanding* an illegal fee or present by color of office. 31 *Am. Jur.* 2d, §2, p. 902. See *State* v. *Begyn, supra,* at 45-48. The purpose of our extortion statute was simply to punish the officer who illegally took the fee. *Id.* at 46. In bribery both the officer and the recipient are guilty of the offense. *Id.* at 48.

The substantive crimes of misconduct in office and extortion set forth in the conspiracy indictment could be and were committed by defendant alone when he received money which he was not officially entitled to and then corruptly regraded examination papers. Furthermore, Broskie and the others were not indispensable to the commission of misconduct in office and all of them were not indispensable to the extortion. Therefore, we hold the so-called Wharton rule to be inapplicable. See *United States* v. *Smolin,* 182 F. 2d 782, 786 (2 Cir. 1950); *United States* v. *Corallo,* 281 F. Supp. 24, 29 (S.D.N.Y. 1968); *United States* v. *Cogan,* 266 F. Supp. 374 (S.D.N.Y. 1967).

Finally, defendant asserts that the indictment charging the offense of misconduct in office, alleged to have happened in Middlesex County, was improperly and unlaw-

fully returned by the Essex County grand jury, and placing defendant on trial thereon in the latter county was illegal and prejudicial to his constitutional rights. This point is utterly without merit. Venue is not jurisdictional, it is merely a matter of practice and procedure, as long as it appears the offense was committed within the State. *State* v. *DiPaolo,* 34 N. J. 279, 287-288 (1961); *State* v. *Greco,* 29 N.J. 94, 104 (1959). Hence, a question of venue does not implicate the jurisdiction of a grand jury. *In re Salvi,* 34 N.J. 450, 451 (1961). Further, a claim of improper venue must be raised by pretrial motion or else is considered waived. *State* v. *DiPaolo, supra,* at 288; *State* v. *Greco, supra,* at 105; *State* v. *Schultheis,* 113 N.J. Super. 11, 19 (App. Div. 1971).

Additionally, although the indictment alleges only offenses in Middlesex County, it appears that the solicitation of the offenses was committed by an aider and abettor in Essex County, Broskie's office being in East Orange. In no event do we find that defendant suffered prejudice by the Essex County indictment and trial.

Judgment affirmed.

APPENDIX B

On Petition for Certification

SUPREME COURT OF NEW JERSEY

C-499 SEPTEMBER TERM 1970

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JOSEPH J. SEAMAN,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of July, 1971.

IRVING B. ZUCKNER
Acting Clerk of the Supreme Court

True Copy

IRVING B. ZUCKNER
Acting Clerk

Filed
July 7, 1971
ILLEGIBLE
Clerk

Supreme Court of the United States

October Term, 19[illegible]

No. 71-487

JOSEPH S. SEAMAN,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

JOSEPH S. SEAMAN,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Opinion

The Order of the Supreme Court of the State of New Jersey denying certification was without opinion and is printed in 58 N. J. 594, 279 A. 2d 679 (Pa15).* The

* Indicates Petitioner's Appendix.

opinion of the Appellate Division of the Superior Court of New Jersey affirming the judgment of conviction is printed in 114 N. J. Super. 19, 274 A. 2d 810 (Pa1-14). The opinion of the United States District Court for the District of New Jersey (per Lacey U.S.D.J.) denying petitioner's application for a writ of habeas corpus is reported in 329 F. Supp. 875 (Ra1-12).**

Jurisdiction

See Argument (Point I), *infra*.

Questions Presented

1. Whether the New Jersey co-conspirator exception to the hearsay rule violates an accused's Sixth Amendment right to confrontation when it is used to introduce statements made in furtherance of the conspiracy by a co-conspirator available to the defense as a witness.

2. Whether the New Jersey co-conspirator exception to the hearsay rule violates an accused's Sixth Amendment right to confrontation when it is used to introduce tape recordings of statements made in furtherance of the conspiracy by a co-conspirator available to the defense as a witness.

** Indicates Respondent's Appendix. The petitioner raised the same issues in his habeas petition as he now presents to this Court in his petition for writ of certiorari. For the convenience of the Court the respondent has included in its appendix the opinion of the District Court.

Statement of the Case

This is a petition for a writ of certiorari to review a decision of the New Jersey Superior Court, Appellate Division, affirming petitioner's conviction for the substantive offenses of misconduct in office (N.J.S. 2A:85-1), conspiracy to extort (N.J.S. 2A:98-1), and extortion (N.J.S. 2A:105-1). Petitioner's application to the New Jersey Supreme Court for certification was denied. His petition for a writ of habeas corpus was also denied in a lengthy opinion by United States District Court Judge Frederick Lacey.

The conviction was based on petitioner's improper conduct while serving as a Secretary of the New Jersey State Board of Certified Public Accountants. One of the powers conferred upon petitioner in this position was the sole and exclusive right to review and upgrade examination marks of unsuccessful candidates for Certified Public Accounts certification in the State of New Jersey. Petitioner abused this power by regrading the papers of at least six unsuccessful candidates (five of whom were named as co-conspirators) while improperly accepting large sum of money. Petitioner's confederate in this operation was Stanley Broskie, an instructor of a "cram" review course designed to prepare enrollees for the Certified Public Accountants examination. Broskie, who was also named as a co-conspirator, approached each of the six unsuccessful candidates and offered to have their examinations regraded if they would pay him a certain sum of money (usually $500.00), and also tender an additional amount (usually $1,000.00) to petitioner at his office. The money was to be delivered to petitioner in envelopes containing bills of small denominations with the explanation that it was for his "favorite charity", allegedly a scholarship fund in Seaman's name.

The six unsuccessful candidates all testified at trial as to their involvement in this scheme. In each case, petitioner accepted the envelope containing the cash without issuing a receipt, and none of the candidate's "contributions" were itemized in the scholarship fund's records. In some cases the reason for the "contribution" was never discussed, the envelopes being passed to petitioner without comment. Petitioner, testifying in his own behalf, admitted that he accepted "contributions" from twenty-two of twenty-three persons whose examinations he regraded.

This operation continued unimpeded until Broskie approached John Kortbowi, an Internal Revenue Service Agent, who had taken and had failed the Certified Public Accountants examination. At the time Broskie first spoke with the witness, he was unaware that Kortbowi was an Internal Revenue Service Agent. After Kortbowi informed Broskie of his position, Broskie replied, "Wow, you're hot stuff. If I had known that I wouldn't have called you." However, Broskie observed that Kortbowi was "a big boy" and knew "what the score is in this world," and thereupon made Kortbowi the same proposition that he had offered the other unsuccessful candidates.

At Broskie's suggestion, Kortbowi met with the petitioner. Following Broskie's instructions, Kortbowi offered to make a contribution to the petitioner's scholarship fund. Petitioner said he would help Kortbowi with or without a contribution. Thereafter, Kortbowi had several telephone conversation with Broskie regarding the regrading of his examination.

Kortbowi informed his superiors of the matter after his first meeting with Broskie, and tape recordings were made of the subsequent telephone conversations between the two men with Kortbowi's consent. These tape record-

ings were introduced at trial. In addition, Kortbowi testified and was subjected to defense counsel's lengthy cross-examination.

In addition to the testimony of the six unsuccessful candidates and of Kortbowi concerning their conversations with Broskie, and the Kortbowi-Broskie telephone recordings, other evidence was introduced to substantiate the charges brought against petitioner. Both the New Jersey Superior Court, Appellate Division, which reviewed petitioner's appeal, and the United States District Court, which entertained petitioner's application for a writ of habeas corpus, were satisfied that the State had presented a *prima facie* case of conspiracy prior to admitting the hearsay statements of Broskie into evidence. See *State* v. *Seaman*, 114 N. J. Super. 19, 29-30, 274 A. 2d 810, 815 (App. Div. 1971) (Pa9); *United States ex rel. Seaman* v. *Cryan*, 329 F. Supp. 875, 880 (D. N. J. 1971) (Ra6).

Broskie himself did not testify. His statements to the six unsuccessful candidates who did testify, and his statements to Kortbowi (presented by Kortbowi's live testimony and tape recordings of telephone conversations) were received into evidence under the co-conspirator exception to the hearsay rule, *New Jersey Evidence Rule* 63 (9)(b).

Petitioner preserved the question of the admissibility of these statements for appeal. The broad confrontation issue was raised at trial and again on appeal to the Appellate Division of the New Jersey Superior Court. However, it was not precisely raised in petitioner's unsuccessful application for certification to the Supreme Court of New Jersey. See *United States ex rel. Seaman* v. *Cryan*, 329 F. Supp. at 877 (Ra3). Despite what it termed questionable compliance with the exhaustion of State remedies requirement, the District Court entertained peti-

tioner's application for a writ of habeas corpus, and denied the same after consideration of the same issues presented in the instant petition for a writ of certiorari. The District Court thereafter refused to certify probable cause for appeal. A subsequent motion made in the United States Court of Appeals for the Third Circuit for a Certificate of Probable Cause was also denied. Petitioner now returns to attack the State court's disposition of his claims.

ARGUMENT

I. Petitioner has not properly completed available State appellate remedies.

Petitioner broadly raised at trial and on appeal to the Superior Court of New Jersey, Appellate Division, the confrontation issues that he now presents to this Court. However, he did not precisely raise these issues in his petition for certification addressed to the Supreme Court of New Jersey. In that petition he raised only the question of whether "the admission of the tape conversation between Kortbowi (the witness) and Broskie, a defendant whose case had already been disposed of, was reversible error." See *U. S. ex rel. Seaman* v. *Cryan, supra.* 329 F. Supp. at 877 (Ra3). Petitioner thus complained of the introduction of the recordings into evidence, but not of the hearsay testimony of Kortbowi, or of the other witnesses, under the co-conspirator hearsay exception.

Since the application of *New Jersey Evidence* Rule 63 (9)(b), a statutory enactment, is at issue, abstention on the part of this Court would appear to be in order until such time as petitioner affords the Supreme Court of New Jersey the opportunity to pass upon the questions presented in the instant petition. See *Harrison* v. *NAACP*, 360 U. S. 167, 176-77 (1959).

II. The decision of the State court was in accord with applicable decisions of this Court.

Both the United States district court and the State appellate court below passed upon the issues that petitioner raises in his present application for a writ of certiorari. See *State* v. *Seaman, supra,* 114 N. J. Super. 19; *U. S. ex rel. Seaman* v. *Cryan, supra,* 329 F. Supp. 875. Both courts reviewed past decisions of this Court that are applicable, and correctly applied the law enunciated in those decisions to the facts of the instant case.[1]

Both courts found dispositive this Court's decision in *Dutton* v. *Evans,* 400 U. S. 74 (1970), decided just last term. *Dutton* directly concerned the constitutionality of a state's (Georgia's) co-conspirator hearsay rule. Unlike its federal or New Jersey counterparts the Georgia rule provided for the admission into evidence of statements made in the concealment phase of a conspiracy. The New Jersey and federal rules provide only for the admission of statements made in furtherance of an ongoing conspiracy. The rule was invoked in *Dutton* to admit an accomplice's statement that inculpated the defendant in a multiple murder of policemen. The accomplice (who was tried separately) was not called to testify at defendant's trial. A fellow prisoner in the prison where the accomplice had been confined at the time of his arraignment for the murders testified that the accomplice had made the statement to him after his arraignment.

---

[1] The threshold question properly put into focus by both courts was whether the State had made out a *prima facie* case of conspiracy prior to admitting the hearsay statements of Broskie into evidence. Both courts determined that the State had made such a showing. 114 N.J. Super. at 29-30 (Pa9); 329 F. Supp. at 880 (Ra6).

The defendant in *Dutton* attacked Georgia's conspiracy rule on two grounds: (1) it did not coin[illegible]e with the hearsay exception applicable in a similar federal prosecution, and (2) it constituted a denial of his constitutional right of confrontation. This Court rejected the defendant's first contention by refusing to equate the limits of the federal evidence rule with boundaries of the confrontation clause. As for the second ground, this Court found in the record "indicia of reliability" that warranted the out-of-court statement being placed before the jury even though there was no confrontation of the declarant. This Court distinguished other recent decisions wherein state court convictions were reversed because of the denial of confrontation, as not being within the recognized conspiracy exception. 400 U. S. at 87. See *Pointer* v. *Texas*, 380 U. S. 400 (1965); *Douglas* v. *Alabama*, 380 U. S. 415 (1965); *Brookhart* v. *Janis*, 384 U. S. 1 (1966); *Barbar* v. *Page*, 390 U. S. 719 (1968); *Bruton* v. *United States*, 391 U. S. 123 (1968); *Roberts* v. *Russell*, 392 U. S. 293 (1968).

Despite the fact that *Dutton* rejected these cases as being of any precedential value upon the issue, and that none of these cases stands for the proposition that an available co-conspirator declarant must be called by the State to testify in order that he may be cross-examined, nonetheless petitioner urges the Court to declare unconstitutional New Jersey's co-conspirator exception to the hearsay rule.

A consideration of the facts of the present case reveals the absurdity of petitioner's position and the soundness of the *Dutton* holding. Some four months prior to trial, Broskie gave a statement to the prosecutor in which he confirmed the outlines of the conspiracy between petitioner and himself. The statement also confirmed later

trial testimony of the unsuccessful candidates as to conversations they had with Broskie concerning the details of the conspiracy. In return for the statement, Broskie was allowed to plead guilty to one count of the indictment (for which he was fined $1,000) and promised that the remaining counts would be dismissed. Defense counsel received a copy of Broskie's statement prior to trial.

Shortly before trial, Broskie, in the presence of his own counsel, informed the prosecutor that he was "hostile to the State", and wanted to help the petitioner "in any way" that he could. 329 F. Supp. at 884 (Ra10), 114 N. J. Super. at 29 (Pa10). The prosecutor's subsequent conduct dispels any doubts about misconduct on his part. At trial he stated on the record that he was going to dismiss the open indictments against Broskie no matter what the outcome of the trial. He also said he would not object to the petitioner reopening his case to call Broskie as a defense witness. The trial judge offered petitioner the same opportunity. Although it is uncontroverted that Broskie was available to the petitioner as a witness, the petitioner declined to call him.

Moreover, there were ample "indicia of reliability" as required by *Dutton*, to substantiate Broskie's extra-judicial statements. The petitioner himself testified and confirmed much of the State's case. For example, petitioner admitted conversations with Broskie concerning regrading, and also that when cash was offered to him for his scholarship fund he would and did accept it.

Most importantly, as was the case in *Dutton*, petitioner here had the full opportunity to cross-examine those witnesses who repeated Broskie's extra-judicial statements, in order to test the accuracy of their testimony. The same considerations apply to the admission of the recordings of Broskie's conversations with Kortbowi; the re-

cordings merely corroborated Kortbowi's testimony as to Broskie's statements.

In short, *New Jersey Evidence Rule* 63 (9)(b) as applied at petitioner's trial was by *Dutton* standards constitutionally permissible, and did not deprive petitioner of his Sixth Amendment right to confrontation. As noted in *Dutton*, the hearsay rule and the confrontation clause contained in the Sixth Amendment overlap, but should not be equated in strict terms. See 5 *Wigmore, Evidence* § 1397, p. 131 (3rd ed. 1940). The Sixth Amendment was not intended to act as a prohibition on the use of all hearsay. The states should be afforded certain latitude in developing their own rules of evidence. See Chadbourn *"Bentham and the Hearsay Rule"*, Harv. L. Rev. 620 (1956); Comment *"Confrontation and the Hearsay Rule,"* 75 Yale L. J. 1434, 1436 (1966); *Uniform Rules of Evidence, Rule* 63 (9)(b). To adopt the position now urged by petitioner would altogether eliminate the use of much hearsay evidence permitted in criminal trials at a time when the judicial trend has been toward a salutory liberalimtion of hearsay exceptions. It would also ignore the rule long recognized in New Jersey and throughout the country that in the case of the co-conspirator hearsay exception, the purpose and object underlying the confrontation requirement are satisfied because the circumstances afford a sufficient guarantee of testimonial trustworthiness to justify admissibility. *Lutwak* v. *United States*, 344 U. S. 604, 617 (1963); *Fiswick* v. *United States*, 322 U. S. 211, 216-17 (1946); *Glazer* v. *United States*, 315 U. S. 60, 66 (1942); *United States* v. *Plata*, 361 F. 2d 958 (7th Cir. 1966); *State* v. *Carbone*, 10 N. J. 329, 343, 91 A. 2d 571 (1952); *State* v. *Boiardo*, 111 N. J. Super. 219, 229, 268 A. 2d 35 (App. Div. 1970), certif. denied 57 N. J. 130, 270 A. 2d 33 (1970), certiorari denied 400

U. S. 859 (1970), *certif.* den., 57 N. J. 130 (1970), *cert.* den. 400 U. S. 859 (1971); 2 *Jones Evidence* § 430, pp. 132-35 (12th ed. 1955); *Wharton's Criminal Law and Procedure,* § 90, pp. 194-98 (1957); *Wigmore, Evidence* § 1079 (3rd Ed. 1940); *Underhill's Criminal Evidence,* § 776, pp. 1410-14 (1935); Annot. 4 *ALR 3rd* 684 (1965); 16 *Am Jur. 2d Conspiracy* § 40 (1964).

For these reasons, the application for writ of certiorari to review the attenuated claims that petitioner puts before this Court should be dismissed with the same closing comments stated by the Court in *Dutton*:

> "There is a real danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." 400 U. S. at 89-90, quoting from *Snyder* v. *Massachusetts,* 291 U. S. 97, 122 (1934) (opinion of the Court by Cardozo, J.)

CONCLUSION

For the reasons hereinabove stated, the State submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

JOSEPH P. LORDI
Essex County Prosecutor
By: DAVID S. BAIME
Assistant Prosecutor

THOMAS J. McCORMICK,
Legal Assistant,
On the Brief.

[APPENDIX FOLLOWS]

APPENDIX

Opinion of the United States District Court for the District of New Jersey

United States ex rel. Seaman v. Cryan, 329 F. Supp. 875 (D. N. J. 1971).

MEMORANDUM and ORDER

LACEY, District Judge:

The relator seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241 et seq. Tried in Superior Court of New Jersey, Law Division, Essex County, he was found guilty by a jury on three separate indictments for (1) official misconduct in violation of N.J.S.A. 2A:85-1, (2) a conspiracy to extort in violation of N.J.S.A. 2A:98-1, and (3) extortion in violation of N.J.S.A. 2A:105-1. He was thereafter sentenced overall to 1-3 years and fined $5,000.

The conviction was affirmed by the Superior Court, Appellate Division, State v. Seaman, 114 N. J. Super. 19, 274 A. 2d 810 (1971), and the Supreme Court of New Jersey, on July 8, 1971, 279 A. 2d 679, denied certification. On July 12, 1971, this petition was filed, and at the same time, an order was signed in this Court continuing relator on bail.

The relator raises in his petition one narrow constitutional question: were his rights under the Confrontation Clause of the Sixth Amendment,[1] applicable to the states

[1] The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right • • • to be confronted with the witnesses against him. • • •"

through the Fourteenth Amendment,[2] abridged when the State placed before the jury hearsay statements made by one Stanley Broskie, an alleged coconspirator of relator, to various State witnesses who, with one exception, were also named as coconspirators, where Broskie himself, a severed co-defendant as well, was, while available, not called by the State to testify?

Secondary to, and as a part of this basic question, the relator strenuously asserts constitutional impropriety in the trial judge's having permitted the State to supplement and corroborate the in-court testimony of one of the co-conspirator witnesses (Kortbowi) by recordings of telephone conversations between him and Broskie.[3]

The broad confrontation issue was squarely raised at the trial level and again in the Appellate Division. However, it was not so precisely raised in the Petition for Certification addressed to the Supreme Court of New Jersey. Point I thereof is entitled "The admission of the tape conversation between Kortbowi (the witness) and Broskie, a defendant, whose case had already been disposed of, was reversible error." Thereafter, the emphasis in the ensuing argument is placed upon the recording, not upon the

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[2] Pointer v. Texas, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); Douglas v. Alabama, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965).

[3] Broskie, indicted with the relator as a co-defendant and co-conspirator, had been severed prior to trial and had pleaded guilty "to one count and was sentenced to pay a fine of $1,000." Since the trial "the severed counts * * * have * * * been dismissed. * * *" (Petition for Writ of Habeas Corpus, para. 4). On oral argument counsel were agreed that the guilty plea was addressed to the conspiracy count.

extensive hearsay now challenged. As put by the relator in the Petition for Certification: "The introduction of Kortbowi's testimony verbally relating his conversation with Broskie, even although [sic] it was out of the presence of the defendant, would have been one thing and might of [sic] itself been admissible without error." Thus the Petition for Certification does not complain of the admission of the hearsay testimony of Kortbowi, or others, allowed by the trial judge under the coconspirator exception.

Nonetheless, while relator's compliance with the comity doctrine of exhaustion of state remedies may fairly be questioned, Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963), this Court may permissibly proceed, as hereinafter set forth, to resolve the posed substantive issue. United States ex rel. Speaks v. Brierley, 417 F. 2d 597 (3 Cir. 1969); In re Ernst's Petition, 294 F. 2d 556 (3 Cir. 1961). See United States ex rel. Turner v. Rundle, 438 F. 2d 839 (3 Cir. 1971), notes 26, 28; *cf.* Williams v. Oriscello, 441 F. 2d 1113 (3 Cir. 1971).

No detailed factual recital of all the testimony is required. Careful review of the record[4] and analysis of the state court appellate briefs indicate substantial, if not absolute agreement between counsel on the material facts as developed at the trial, and as ultimately embodied in the opinion of the New Jersey Superior Court,

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[4] In this proceeding, Trial Transcripts are marked P-5 through P-14. Other exhibits are: P-1 (Q. and A. of Stanley Broskie by Prosecutor, May 8, 1969); P-2 (Appellate Division Brief and Appendix of Defendant); P-3 (Defendant's Reply Brief in Appellate Division); P-4 (Defendant's Petition for Certification and Supplemental Appendix); D-1 (State's Brief in Appellate Division); D-2 (State's Supplemental Brief-letter).

Appellate Division. *See* Opinion in the Petition for Certification (P-4), 1a-13a.

Nonetheless, for an understanding of the constitutional question raised by this Petition the following facts are deemed significant.

The relator, a Certified Public Accountant, and practicing Attorney, as Secretary of the State Board of Certified Public Accountants ("Board") during the relevant period, had the sole and exclusive right to review and upgrade to passing marks examination grades of unsuccessful examinees applying for C.P.A. certification in the State of New Jersey.

The charges in the Indictment stemmed from relator's upgrading to passing the examination papers of Messrs. Pacca, Stern, Van Hook, Glick, Berr, and Cerny.[5] All had previously failed on several occasions at least one part of the four-part C.P.A. examination and thereafter had enrolled in the "cram" or "coach" course, conducted by Broskie, and designed to prepare enrollees for the Board examination.

Pacca, having failed two of four parts of the examination, was told by Broskie that he could get his paper regraded to passing for $1,500. cash, and, accepting the proposition, Pacca thereafter was upgraded to passing, paid $500. cash to Broskie, and, at Broskie's direction, $1,000. in cash to the relator at his office, telling the relator, as Broskie had directed, that the cash was for the Joseph J. Seaman Scholarship Fund. There actually was such a Fund, duly administered, which enjoyed tax exempt

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[5] All but Stern were named as coconspirators of the relator and Broskie.

status and contributions to which were tax deductible. When the relator accepted Pacca's $1,000. he said, according to Pacca, that he thought "I would have passed the exam anyway next time and that he was kind of helping me out, going out on a limb, to kind of push me ahead." The relator accepted the cash, did not count it, did not inquire about how Pacca knew of the Fund, gave no receipt, and did not advise of the deductibility of the "donation", although the relator knew a bona fide gift to the Fund was deductible. Pacca, of course, never claimed a deduction on his own return. The Fund's records showed no contribution from Pacca.

Stern's testimony mirrored Pacca's. Having failed, he was told by Broskie he could be upgraded to passing for $1,500. in cash. Stern agreed to the proposition. He too was upgraded to passing, gave $500. to Broskie and, at the latter's direction, delivered $1,000. to the relator, again in cash. Stern testified he simply put the cash, in an envelope, on the relator's desk without saying a word. It was the relator who mentioned that it was for the scholarship fund. In all other respects, the transaction matched that in which Pacca was involved.

Van Hook was sent to the relator by Broskie to review a failing test paper, and at this meeting the relator promised him a review. Shortly thereafter Van Hook received word that he had been upgraded to passing. Broskie then told him: "I will tell you how much it is going to cost." The message was the same $500. to Broskie and $1,000. to the relator, for the scholarship fund. Van Hook delivered the $1,000. cash to the relator, telling him "I appreciate the regrade. I want to contribute to the scholarship fund." The relator replied: "* * * be a credit

to the profession." The rest of the transaction was similar to that involving Pacca and Stern.

Glick too had met with relator at Broskie's suggestion and thereafter took the examination. A month later he called the relator to discuss his performance but was told he was premature. Thereafter he met with the relator who told him he had failed but that he, the relator, "would see what he could do."

Still later Glick received word he had been regraded to passing. He told Broskie of what had occurred and once again the direction to deliver $1,000. to the relator was given. Glick did in fact hand $1,000. in cash to the relator, telling hm it was for his "favorite charity." Again, the relator did not issue a receipt, did not count the cash in Glick's presence, did not discuss his "favorite charity" or even ask whether or not there was any subjective connection between the regrading and the gift of cash.

Berr, following an examination, was told by Broskie that he had failed two parts of it but that Broskie could arrange for a regrading to passing for "two big ones." Berr then met the relator at Broskie's suggestion and told him he wanted to make a contribution to the scholarship fund. Berr thereafter got word he had been regraded to passing and subsequently, at Broskie's direction, delivered $1,000. cash to the relator, under circumstances substantially like those surrounding the other cash deliveries.

Cerny, unsuccessful in the November, 1965, and May, 1966, examinations, enrolled in Broskie's course just prior to the November, 1966 examination. At Broskie's suggestion, Cerny met the relator who told him his paper would be reviewed.

Appendix

Cerny took the November, 1966, examination but failed it, then took the May, 1967, examination, and failed again, but Broskie told him he would arrange to have the paper reviewed. A few months later, even before Cerny got formal notice, Broskie called him to tell him he had been regraded to passing, and that it would be necessary for him to make a donation to relator's scholarship fund. Again, $1,000. in cash went to the relator, under the same circumstances as with the others.

Kortbowi is in a different category. He was never upgraded to passing and never paid any cash to the relator. He was an Internal Revenue Service agent who was approached by Broskie in typical fashion. Broskie bluntly told him he would have to make an appointment for him "with Joseph Seaman".

Thereafter, at Broskie's suggestion, Kortbowi met with the relator and, following Broskie's instructions, said he wanted to contribute to the relator's scholarship fund. The relator said he would help him with or without a contribution. Kortbowi reported the matter to his superior and recordings were made of telephone conversations between Kortbowi and Broskie (*See* Factual Statement, State's Brief in Appellate Division, D-1, pp. 14, et seq.)

These telephone conversations were damaging to the relator's interests at the trial, as was Kortbowi's testimony.

Kortbowi had no further conversations with the relator and Broskie was arrested before Kortbowi received formal regrading. As stated, he never delivered any cash to the relator.

Each of the men who had delivered $1,000. to the relator, and Kortbowi, testified as to conversations they had had with Broskie. It is this testimony (and the Kortbowi-Broskie telephone recordings) which was admitted pursuant to the coconspirator exception, and admission of which the relator now claims violated his confrontation rights.

The relator does not claim that the hearsay statements of Broskie were not in furtherance of the alleged conspiracy.

Preliminarily, there is something that needs to be said, for the courts, for litigants, and for the people of this country who are distressed at the inability of our courts to discharge their business. This proceeding, commenced just a few days after the New Jersey Supreme Court denial of certification, dramatizes the recurrent utilization of federal habeas corpus for what is becoming, practically speaking, one more appeal. The Court of Appeals of this Circuit has recently stated in Williams v. Oriscello, 441 F. 2d 1113, 1114 (3 Cir. 1971):

> "• • • the Supreme Court made it clear • • • that federal habeas corpus may not be used in lieu of an appeal itself, since this would 'subvert the entire system of state criminal justice' and would premit the use of habeas corpus 'as a matter of procedural routine to review state criminal rulings.'"

This Court too is concerned at the developing trend among able and assiduous counsel to tack on to their state court appeals, "as a matter of procedural routine", federal habeas corpus proceedings. Though it may be futile

or ineffectual for a District Judge to proclaim it, this is, it would seem, a perversion of the Great Writ. *See* Nelson v. O'Neil, 402 U. S. 622, 630-634, 91 S. Ct. 1723, 1728-1729, 29 L. Ed 2d 222 (June 1, 1971), Justice Harlan concurring, quoting from his dissent in Mackey v. United States, 401 U. S. 667, 675, 691, 91 S. Ct. 1160, 1171, 1179, 28 L. Ed. 2d 404, 410 (April 5, 1971):

> "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."

Relator's eminent counsel I do not criticize. They represent their client vigorously and ably. My cavil is aimed at the distortion of the Writ, a distortion now so institutionalized that legal representation which does *not* routinely travel the course of federal habeas corpus, after unhappy state appellate experience, is becoming a rarity. Legislative relief is sorely needed!

Proceeding to the matter at issue, relator's petition, as it complains of the admission of hearsay testimony against him, omits one very significant averment: Broskie, whose extra-judicial statements to the State's witnesses were testified to by them, was charged with being a coconspirator and co-defendant of the relator. The witnesses, themselves, with one exception, were also charged coconspirators, but not defendants.

Inquiry, therefore, initially must be directed to ascertaining whether, aside from the objected to hearsay statements, there was sufficient evidence of a conspiracy in-

volving the relator. The answer is manifest: there was. The Appellate Division opinion properly puts this point in focus, 114 N. J. Super. at 28, 274 A. 2d at 814:

> "Defendant's assertion that the State failed to prove a *prima facie* case of conspiracy prior to the admission of the tapes is without merit. In such a situation the threshold requirement for admissibility is satisfied by showing the likelihood of an illicit association between the declarant and defendant. United States v. Ragland, 375 F. 2d 471, 477 (2 Cir. 1967), cert. den. 390 U. S. 925, 88 S. Ct. 860, 19 L. Ed. 2d 987 (1968). Prior to the introduction of the tapes, Pacca, Cerny and the others all testified to the 'likelihood' of such an illicit agreement." (emphasis in original)

The Appellate Division dealt with the issue further, 114 N. J. Super. at 29-30, 274 A. 2d at 815:

> "[Defendant contends] there was insufficient evidence of a conspiracy independent of hearsay declarations of the alleged accomplice. We find there was.
>
> A conspiracy may be proved either by direct or circumstantial evidence. State v. Carbone, *supra*, 10 N. J. [329] at 341, 91 A. 2d 571.
>
> "* * * Among other facts, it was not contradicted that he accepted envelopes from each containing small bills without counting them, immediately after regrading their examinations."

There was adequate support in the record to support the Appellate Division's determination. 28 U.S.C. § 2254

(d); United States ex rel. Dickerson v. Rundle, 430 F. 2d 462 (3 Cir. 1970).

The federal rule in this respect, requiring sufficient "independent" evidence of a defendant's involvement in a conspiracy before a coconspirator's hearsay declarations can be considered is like that applied in this case by the Appellate Division.

Thus in United States v. Weber, 437 F. 2d 327, 337 (3 Cir. 1970), note 11, Judge Adams stated:

> "'It is enough if evidence, other than that whose admissibility is under challenge, disclosed one [a conspiracy]. St. Clair v. United States, 1894, 154 U. S. 134, 149, 14 S. Ct. 1002, 38 L. Ed. 936; United States v. Pugliese, 2 Cir. 1945, 153 F. 2d 497, 500; People v. Luciano, 1938, 277 N. Y. 348, 14 N. E. 2d 433.' United States v. Annunziato, *supra,* at 378." (293 F. 2d 373 (2 Cir. 1961).

Subsequent to *Weber* the Third Circuit Court of Appeals reiterated the same principle in United States v. DeCavalcante et al., 440 F. 2d 1264, 1272 (3 Cir. 1971), at note 13:

> "* * * hearsay statements of co-conspirators whether or not named in the indictment are admissible at trial, provided a conspiracy involving them is in fact established at trial."

And see United States v. American Radiator & Standard Sanitary Corp., 433 F. 2d 174 (3 Cir. 1970), approving the admission of hearsay statements of a coconspirator after "a prima facie case of conspiracy had been made out. * * *" 433 F. 2d at 196. See also Parness v. United States, 415 F. 2d 346 (3 Cir. 1969).

Appendix

Guideposts were set most recently in this Circuit for federal conspiracy trials by United States v. Bey et al., 437 F. 2d 188 (3 Cir. 1971):

> "* * * While it is true that hearsay statements are inadmissible when no independent evidence links the declarant to the defendant, Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), the threshold requirement for admissibility is satisfied by presenting a likelihood of an illicit association * * * The trial judge has wide discretion and need only be satisfied, if he accepts the independent evidence as credible, that such evidence is sufficient to support a finding of joint undertaking. * * *"

Bey then quotes from United States v. Geaney, 417 F. 2d 1116, 1120 (2 Cir. 1969):

> "* * * the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. * * *"

New Jersey's procedures are congruent and there is ample support in the record to support the determination of the state trial and appellate courts that the prosecution, in the words of *Geaney,* has "proved participation in the conspiracy, by the defendant against whom the hear-

say is offered, by a fair preponderance of the evidence independent of the hearsay utterances."[6]

The hearsay declarations complained of were admitted under New Jersey's Evidence Rule 63(9), providing:

> "A statement which would be admissible if made by the declarant at the hearing is admissible against a party if * * * (b) at the time the statement was made the party and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan."

This rule is not only co-extensive with the federal coconspirator hearsay exceptoin but is also well within the conspiracy hearsay exception to the confrontation requirement. United States v. Bey, et al., 437 F. 2d 188 (3 Cir. 1971). *See also,* Dutton v. Evans, 400 U. S. 74, 81-82, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), referred to in United States v. Weber, *supra,* 437 F. 2d at 340.[7]

[1] Accordingly, the broad claim that confrontation rights of the relator were violated is without merit.

The relator, however, carries his argument beyond this point. He next claims that where the coconspirator declarant is physically available, it is the State's obligation to call him as a witness. This is a positoin which rests

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[6] Relator's counsel on oral argument, held July 22, 1971, virtually conceded this.

[7] "* * * Indeed, as indicated in *Dutton* the federal evidentiary rules of hearsay may be more stringent than the constitutional limits embodied in the Sixth Amendment. *Dutton, supra,* 400 U. S. at 74, 91 S. Ct. 210."

in part upon the Confrontation Clause but may be also said to implicate due process principles of a fair trial. *See,* Justice Harlan's concurring opinion in Dutton v. Evans, *supra,* 400 U. S. at 96-97, 91 S. Ct. 210. This contention superficially draws some support from Third Circuit dicta in *Weber, supra,* where Judge Adams wrote (437 F. 2d at 338):

> "Recent Supreme Court cases—Pointer v. Texas, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); Douglas v. Alabama, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965); Barber v. Page, 390 U. S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968), Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)—have expanded the Government's obligation to provide a defendant with the opportunity to cross-examine the witnesses testifying against him, when it is within the Government's power to do so."

Weber then adds (437 F. 2d at 338):

> "However, none of these decisions has altered the traditional understanding that the Confrontation Clause does not prohibit all hearsay exceptions, nor do any of the decisions involve statements made by a co-conspirator who had died before testifying."

Weber of course involved hearsay declarations of a deceased coconspirator. *Weber* in that connection states, 437 F. 2d at 336:

> "When the co-conspirator declarant is available as a witness,[8] there is no doubt that hearsay prin-

[8] Interestingly, and perhaps significantly, the words "available as a witness" are used, rather than words imposing an obligation upon the Government to "call the witness" on its case.

> ciples do not prevent the introduction into evidence of extra-judicial statements made by the co-conspirator in furtherance of the conspiracy. The fact that Burgess had died before trial strengthened, rather than weakened, the Government's argument for admitting the extra-judicial statements." (Original footnotes omitted).

Finally, after mention of the viability in the Third Circuit of the "co-conspirator exception * * * [to] the Confrontation Clause" as chronicled in American Radiator, *supra,* Judge Adams stated in *Weber,* 437 F. 2d at 339.

> "Had Burgess been alive at the time of trial and available to be subpoenaed by the Government, this case would present substantially different issues[9]; but since the Government cannot be faulted for Burgess' absence from Weber's trial, and since *Delaney* [*Delaney v. United States,* 263 U. S. 586, 44 S. Ct. 206, 68 L. Ed. 462] controls the precise issue here, we hold that Weber's Sixth Amendment rights were not violated."

Obviously the immediately preceding quotation from *Weber* requires analysis. Is there to be found in Judge Adams' words a suggestion to the District Courts of this Circuit that the Confrontation Clause requires that the

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[9] Relator, whose counsel in this proceeding also represented Weber, seeks to derive support from these words "this case would present substantially different issues." He of course recognized at oral argument on this petition that, had Broskie been dead prior to trial, relator's petition would have been squarely within *Weber.*

coconspirator exception be cut back or narrowed to require the Government to call as a witness one in Broskie's position where he is available?

In interpreting Judge Adams' words this Court finds it not without significance that *Weber,* 437 F. 2d at 336, note 9, cites United States v. Annunziato, 293 F. 2d 373 (2 Cir. 1961), where the declarations of a deceased coconspirator were admitted into evidence, and states: "Judge Friendly, on behalf of an unanimous panel, rejected the argument that such testimony was inadmissible and did not even discuss the fact that the declarant, like Burgess, had died before trial."

Additionally, *Weber* was decided against the background of the recently decided Dutton v. Evans, 400 U. S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), from which Judge Adams draws heavily in his opinion. An analysis of *Dutton* is therefore in order.

Dutton is the most recent Supreme Court decision on the interweaving of the strands of the confrontation imperative with the coconspirator hearsay exception.

Justice Stewart put it forthrightly and squarely (400 U. S. at 80, 91 S. Ct. at 215):

> "It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced.
>
> • • •
>
> "• • • Appellee does not challenge and we do not question the validity of the coconspirator exception applied in the federal courts."

Justice Stewart then defined the federal "exception" to require that the "out-of-court statement of one conspira-

for to be admitted against his fellow conspirators" must have been made "in the course of and in furtherance of the conspiracy." It of course clearly appeared that the objected to statement in *Dutton,* admitted by a Georgia trial court, was made, as Justice Stewart put it, "during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise." (400 U. S. at 81, 91 S. Ct. at 216).

Dutton, therefore, dealt with an extension of the so-called "federal exception" so that Justice Stewart was impelled to say, in refining the legal issue presented:

> "But it does not follow that because the federal courts have declined to extend the hearsay exception to include out-of-court statements made during the concealment phase of a conspiracy, such an extension automatically violates the Confrontation Clause." * * *

The "limited contours" of the hearsay exception in federal conspiracy trials, *Dutton* states, are shaped not by the Sixth Amendment, but rather by the Supreme Court, acting through its rule-making power, to implement its "'disfavor' of 'attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.'" (400 U. S. at 82, 91 S. Ct. at 216).

As stated in *Weber* (437 F. 2d at 338), and in *Dutton* (400 U. S. 83-87, 91 S. Ct. 210), recent decisions of the Supreme Court have reversed state court convictions because of the denial of the constitutional right of confrontation, a decisional trend which has, according to *Weber,* "expanded the Government's obligation to provide

a defendant with the opportunity to cross-examine the witnesses testifying against him, when it is within the Government's power to do so." (437 F. 2d at 338). However, as both *Weber* and *Dutton* further point out, the cases cited in support of this "trend" are not within the conspiracy exception.[10] Not one stands for the proposition urged upon this Court, that where the coconspirator declarant is available the State must call him as a witness in order that he can be cross-examined on his extrajudicial "conspiracy furthering" utterances. *Dutton* obviously regards them as of no precedential effect upon the issue before the Court in that case (400 U. S. at 87, 91 S. Ct. 210); and *Dutton* and *Weber*, read together, do not convey to this Court that the relator in the case at bar was, under the present state of the law, deprived of his confrontation right.

Dutton does hint at the possibility of prosecutorial misconduct cutting back on Confrontation Clause exceptions (Justice Harlan, concurring. 400 U. S. at 98, 91 S. Ct. 210, referring to Douglas v. Alabama, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965), and, in that light, it is not inappropriate to explore what happened at the trial of this case to cast light on why Broskie, the coconspirator, was not called by the State.

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[10] Pointer v. Texas, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); Douglas v. Alabama, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965); Brookhart v. Janis, 384 U. S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966); Barber v. Page, 390 U. S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); Roberts v. Russell, 392 U. S. 293, 88 S. Ct. 1921, 20 L. Ed. 2d 1100 (1968) (holding *Bruton* applicable to the States and retroactive).

Appendix

Some 4-months prior to trial the State had obtained from Broskie an incriminatory statement in written question and answer form in which he confirmed the outlines of the conspiracy between the relator and himself. This statement also confirmed the later trial testimony given by the men who delivered cash to Broskie and the relator as to conversations they said they had with him; as to Broskie's ability to get the relator to upgrade their examination papers; as to instructions they received from Broskie in setting up meetings with the relator; and as to the directions Broskie gave them on how, when, and where they were to deliver their $1,000. in cash to the relator. By this statement Broskie not only confessed his own wrongdoing and implicated the relator, but he did so in terms which conformed substantially to the testimony given at the trial by the men who paid.[11]

Of course, Broskie in his statement leaves no doubt why he was making a full disclosure. He had been promised that he could plead guilty to one count of an Indictment (he was fined $1,000.) and that the remaining counts would then be dismissed. Even with the shadow thus cast upon his credibility, it is clear to this Court, and was conceded at argument before this Court by relator's counsel, that testimony by Broskie in accordance with the statement would have been most damaging to his client.[12] Two conclusions, neither of which reflects "prosecutorial misconduct," emerge. First, there was no concealment by

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[11] This statement was marked DJ-1 *Id.* at the trial and P-1 in this proceeding.

[12] Defense counsel received a copy of this statement just prior to trial.

the prosecutor of exculpatory information since he made the statement available to the defense and it was incriminatory, not exculpatory; second, the prosecutor cannot be charged with withholding from the jury information vital to the defense.

The practical question may then be asked: Why did the State not call Broskie? The answer is two-fold. No statutory or decisional law of New Jersey required that it do so; and, in terms of trial strategy, information had come to the prosecutor which led him, on a defense motion at the trial's close for mistrial for the State's failure to call Broskie, to state to the trial judge and to defense counsel: "* * * he [Broskie] has told his counsel in my presence to inform you that he wants to help the defendant in any way that he can * * * so I hardly think that he is a witness that's under control of the State." (Transcript, p. 1341). The prosecutor also stated on the record that he was going to dismiss the open Indictments against Broskie, no matter what happened, and that Broskie was readily available to be called as a witness by the defense. (This latter fact was, at oral argument before this Court, conceded by relator's counsel to have been true.) The prosecutor also said he would not object to defendant reopening his case (Transcript, p. 1330) and the trial judge offered counsel the opportunity, which was declined, to do so.

The mistrial motion was denied.

During summations, defense counsel argued inferences flowing from the State's failure to call Broskie (Transcript, pp. 1364, 1407) and the prosecutor retaliated in kind (Transcript, pp. 1448-9).

Certainly there was nothing in these facts that smacks of "prosecutorial misconduct."[13]

Justice Stewart, in *Dutton,* also dwelt upon "indicia of reliability" and, in that connection, this Court notes that Broskie's pre-trial statement (P-1) differed in no material detail from the hearsay evidence introduced at the trial. Moreover, the relator himself testified and confirmed substantially much of what Broskie was charged with, and admitted in his statement, having said. Thus the relator admitted conversations concerning regrading; that, as Broskie said, he and he alone could regrade; that he did regrade; and that, when, thereafter, cash was offered to him for his Scholarship Fund, he would and did accept it.

The jury had before it a case of accounting applicants, desirous of becoming Certified Public Accountants, in the majority of cases desperate because of repeated failures (one man had failed "thirteen to fifteen" times), who were vulnerable and sensitive to the suggestion from Broskie that they could have past failures regraded to passing in return for a cash contribution to Seaman's Scholarship Fund. Seaman, the relator, was vital to the scheme. Only he could regrade. He dealt with the applicants, personally, subtly and with sophistication. But no amount of sophistry can obliterate or even blur the unaccountable termination of each of the regrading transactions; the relator accepting from the candidates $1,000. in cash

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[13] In *Dutton* both Justice Stewart in the plurality opinion, and Justice Harlan concurring, noted that the coconspirator declarant was available for subpoena by the defendant (400 U. S. at 88 and 96, 91 S. Ct. 210). *See also* United States v. Panepinto, 430 F. 2d 613, 616 (3 Cir. 1970), cert. denied, Orangio v. United States, 400 U. S. 949, 91 S. Ct. 258, 27 L. Ed. 2d 256 (1971).

in small bills, without a receipt, without asking for a check, without even an inquiry about how the "donor" had heard of the Scholarship Fund. This is hardly unimpeachable conduct, made even more questionable by the relator's professional qualifications as an experienced accountant and practicing lawyer. The "indicia of reliability" test was more than met.

Finally, as was the case in *Dutton* (400 U. S. at 78, 91 S. Ct. 210), and *Weber* (437 F. 2d at 340), the relator here had the "full opportunity to cross-examine those witnesses who repeated • • • [Broskie's] extra-judicial statements in order to test the accuracy of their testimony • • •." (*See Weber, supra,* at 340).

[2] Examining *Weber* again, now in light of our sifting of *Dutton,* it is clear that the Third Circuit in *Weber* did not hold that a State, proceeding as the New Jersey courts in this case did, would thereby violate the Confrontation Clause.[14]

Relator's brief urges that Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), applies. As stated in United States v. American Radiator & Standard Sanitary Corp., 433 F. 2d 174 (3 Cir. 1970), and Parness v. United States, 415 F. 2d 346 (3 Cir. 1969), *Bruton* did not "invalidate" the hearsay exception rule in conspiracy cases. Moreover, as pointed out in *American Radiator, supra,* 433 F. 2d at 194, "the United States Su-

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[14] Nor is there a constitutional violation in the Kortbowi-Broskie recordings. They corroborated Kortbowi's testimony as to Broskie's statements. Because they may have made him a more credible witness than he otherwise might have been does not render them constitutionally bad. *Cf.* United States v. White, 401 U. S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971).

preme Court held in 1924 that the conspiracy exception did not deny a defendant his right of confrontation. Delaney v. United States, 263 U. S. 586, 44 S. Ct. 206, 68 L. Ed. 462." *See also,* Nelson v. O'Neil, 402 U. S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (June 1, 1971).

California v. Green, 399 U. S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), has also been urged upon us. But *Green* was a non-conspiracy criminal case and the Court of Appeals of this Circuit has stated that "We do not find that *Green* alters our conclusion that we are bound by holdings that use of the co-conspirator exception does not violate the Confrontation Clause."[15]

[3] In summary, the coconspirator exception to the Confrontation Clause, along with other hearsay exceptions, still stands; New Jersey's procedures, as applied to the relator, were constitutionally proper; the relator received a fair trial; and there was an abundance of evidence to support the verdict of the jury that he was guilty as charged.

[4] The day may come when a higher court decides that the conspiracy doctrine is to be discarded. Until it does, there is no confrontation issue presented by the admission of hearsay statements of a coconspirator. For under the law of conspiracy, acts, whether they be physical or verbal, by one conspirator in the course of, and in furtherance of, the conspiracy are regarded as the acts of the others in the conspiracy; it is as if those others committed those acts, or made the statements. Van Riper v. United States, 13 F. 2d 961, 967 (2 Cir.), cert. denied,

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[15] United States v. American Radiator & Standard Sanitary Corp., 433 F. 2d 174, 194 (3 Cir. 1970).

Ackerson v. United States, 273 U. S. 702, 47 S. Ct. 102, 71 L. Ed. 848 (1926). How then can there be a constitutional confrontation issue?[16]

On the other hand, there may arise a due process issue, under certain circumstances not present in this case, and of course, on a case by case basis, the courts can continue to permit the coconspirator exception to survive.

The record has been sufficient for the determination of the petition and no evidentiary hearing is required. Townsend v. Sain, 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). Moreover, the relator's counsel, at oral argument, disclaimed the necessity for taking of testimony in this proceeding.

For the foregoing reasons,

It is, on this 9th day of August, 1971,

Ordered that the petition of Joseph J. Seaman for a writ of habeas corpus be and hereby is denied, and this Court certifies there is no probable cause for appeal from this Order;

And it is further ordered that the Order entered in this proceeding on July 12, 1971, releasing the relator on bail, be and hereby is vacated.